and until then the $45,000 is not refundable. The facts relevant to this argument are as follows. It is not disputed that so far no *building* plans had been submitted, only *lay-out* plans. They were rejected by the Chief Planning Officer of the city government. This was on 24th January, 1968. Then on 1st February the appellant appealed to the same officer against this decision. This was done with BP's knowledge and consent. On 17th April, 1968, the appellant was told that his appeal had been rejected and he made yet a second appeal to the Minister for Local Government and Housing also with BP's knowledge and consent and no decision has yet been made on this appeal. It is said that until a decision has been made on this appeal adverse to the appellant he is not liable to refund the $45,000 and the issue of the originating summons on 9th July, 1968 (4½ months after issue of Form 16E and more than two months after appeal to the Minister) was void. I do not think that there is anything in this argument. The undisputed fact is that BP are interested in the land only as a site for a petrol pump and to this day no permission has been given to build a petrol pump on it.

It is then argued that the notice given to the appellant on Form 16E was wrong and that it should have been on Form 16D. There is no merit in this argument. Form 16D should be used, in the words of section 253 of the National Land Code, only where there has been "a breach by the chargor of any of the agreements on his part", and the object of using that form is to specify the breach in question so as to give the chargor an opportunity of remedying the breach. Here BP do not allege that there has been a breach by the appellant of any of his agreements, which breach is within the appellant's power to remedy. All that BP allege is that building permission could not be obtained. That being the case, clause 13 of the agreement springs into play, the agreement automatically came to an end and it was open to BP to demand repayment of the $45,000. This they did and according to section 255(1) of the Code where the principal sum secured by a charge is payable on demand the proper notice to issue should be on Form 16E.

It is next argued as follows: that it was for BP to obtain approval for plans submitted, that there is no "approved plan" for Kuala Lumpur and therefore it is unnecessary in law for lay-out plans to be submitted, that the area being unzoned (there was no dispute about this) no town planning permission is required before building plans are submitted, that no building plans have been submitted and until they have been submitted and disapproved, the $45,000 is not refundable. I reject this argument. I agree with BP's counsel that the obtaining of planning permission is part and parcel of the obtaining of approval for building plans and that the disapproval of planning permission is tantamount to disapproval of building plans.

The next arguments relate to interest. The charge states that the loan was to be repaid without interest and it is said that BP are not entitled to demand interest, and if at all they should get interest only from the date of judgment and at only 6%. Further it is said that Form 16E is only for demanding the repayment of principal only and the inclusion of interest on it was a substantial variation that made the notice defective. I do not think that the inclusion of interest made the notice defective. I also think that the learned judge was right to exercise his discretion under section 11 of the Civil Law Ordinance No. 5 of 1956 by awarding interest from the date when the notice reached the appellant, but I think that despite the bank rate the rate of interest awarded should be the rate usually awarded by the court, namely, 6 per cent.

I would therefore dismiss the appeal with costs but reduce the rate of interest from 8 to 6 per cent.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *K. Rajanayagam & Co.; Shook Lin & Bok.*

LAU FOO SUN v. GOVERNMENT OF MALAYSIA

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X92 of 1969]

Practice and Procedure — Appellate court — Further evidence — Principles on which received.

Evidence — Further evidence — Appellate court — Principles on which received.

To justify the reception of further evidence three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

In this case the appellant applied for an order that he be at liberty upon the hearing of the appeal to adduce further evidence. The appellant intended to call a Mr. Callow, who was at the material time the chief architect at the Ministry of Education.

Held, dismissing the application: the appellant had not shown that the evidence he sought to adduce could not have been obtained with reasonable diligence for use at the trial.

Cases referred to:-

(1) *Ladd* v. *Marshall* [1954] 3 All E.R. 745.

(2) *Roe & Anor.* v. *Robert McGregor and Sons Ltd.*; *Bills* v. *Roe & Anor.* [1968] 2 All E.R. 636.

The following cases were also cited in argument: *Brown* v. *Dean* [1910] A.C. 373; 374; *Crook* v. *Derbyshire* [1961] 3 All E.R. 786, 788E, 791G and *Kesarmal & Anor.* v. *Valliappa Chettiar* [1954] M.L.J. 119.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P.: I have read the judgment of my brother Suffian and I agree with him that this application be dismissed for reasons he gave.

It is apparent that Mr. Callow's evidence, if given at the trial would probably have an important influence

on the result of the case in that it would corroborate the evidence of the plaintiff himself on the question of fact which the learned judge had held against the plaintiff. However, in my view the plaintiff could have obtained Mr. Callow to give evidence at the trial if he had used reasonable diligence to discover his whereabouts and that he already knew that Mr. Callow could have corroborated his evidence in court. It would be apparent that the importance of Mr. Callow's evidence was only brought home to the plaintiff after the judge's* finding against him on the fact which could have been corroborated by Mr. Callow.

Suffian F.J.: This is an application for an order that the plaintiff/appellant be at liberty upon the hearing of his appeal to adduce further evidence.

To justify the reception of this evidence "three conditions must be fulfilled:

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;

Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible."

These were the tests enunciated by Denning L.J. (as he then was) at page 748 in *Ladd* v. *Marshall*[1].

I do not think that the appellant has satisfied the first condition. He knew that Mr. Callow was at the material times chief architect at the Ministry of Education, that he had direct knowledge as to what drawings he (the appellant) was required (a) to trace, (b) to modify where necessary, and (c) to prepare new designs from Government drawings and the reasons which made the drawings necessary, and that Mr. Callow's evidence would therefore be important to the appellant's case. The appellant was not an ignorant and unrepresented rustic but the head of an important engineering firm represented by an eminent firm of solicitors. He contrived to trace Mr. Callow's address after judgment and I am of the opinion that it cannot be said that it could not have been obtained before the trial had he used reasonable diligence.

It is next said that, as Mr. Callow was the only officer of the Ministry of Education who had direct knowledge of the transactions in dispute, he would in the ordinary course have been called as a witness by the defendants, that he (appellant) had no reason to think that the defence would not call him as a witness and expected the defence to do so and that, if the defence had called him as a witness, it would have been improper for the appellant to make any approach to him prior to the hearing or to try to ascertain what evidence he would give. In support his counsel, Mr. Peddie, cites *Roe and Another* v. *Robert McGregor and Sons Ltd.; Bills* v. *Roe and Another*[2]. But here it is important to observe that the appellant knew that Mr. Callow was an expatriate officer who had left the country in 1962, i.e., about a year *before* he saw fit to file this claim against the Government, that he or his solicitors knew or should have known that it was most unlikely that the Government would call an expatriate officer who had long since left the country (the trial did not take place until 1967), that it was for him (the appellant) to establish his case and if he or his solicitors thought that Mr. Callow's evidence was all that crucial they could have asked whether the Government intended to call him. This they failed to do.

The Government turned the table on the appellant by themselves calling as their witness an ex-employee of the appellant whose evidence happened to be most damaging to the plaintiff's case. We do not know the arrangements between the two parties prior to the calling of Mr. Ho, but it is not suggested here that there was anything improper on the part of the Government. If the Government could have arranged to call Mr. Ho without any impropriety, the appellant also could have arranged to call Mr. Callow without any impropriety. There was no risk in the appellant properly approaching Mr. Callow for, unlike Mr. Harrison in *Roe's* case[2], he was not a possible claimant against the appellant.

I would therefore dismiss this application.

Ali F.J. concurred.

Application dismissed.

Solicitors: *Skrine & Co.*

* See [1970] 1 M.L.J. 20.

PUBLIC PROSECUTOR v. RAMASAMI

[A.Cr.J. (Wan Suleiman J.) March 4, 1970]

[Alor Star — Criminal Appeal No. 47 of 1968]

Constitutional Law — Citizenship — False statement in declaration for — Declaration would not be in the form of a statutory declaration — Citizenship Rules, 1964, r. 28 — Malaysia Constitution, 2nd schedule s. 16(1)(a).

The respondent had been charged with making a false statement in his declaration for citizenship but he was acquitted as the learned magistrate held that the declaration "was not in the form required of a statutory declaration".

Held, allowing the appeal: in this case there was no necessity to repeat a set formula of declaration. The respondent was charged with making a false statement and the officers were not required to take and receive the declarations but merely required to witness the signature of the applicant upon the prescribed form. In the circumstances the order of acquittal and discharge must be set aside and retrial ordered.

Cases referred to:-

(1) *Teh Kim Chooi* v. *R.* [1955] M.L.J. 37.

(2) *Velumailum* v. *Public Prosecutor* [1947] M.L.J. 152.

(3) *Public Prosecutor* v. *Munusamy* [1967] 1 M.L.J. 238 at p. 240.

MAGISTRATE'S CRIMINAL APPEAL.

Tunku Mukhatar bin Tunku Yaacob (Deputy Public Prosecutor) for the appellant.

Ismi bin Ismail for the respondent.